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No. _____

In The

Supreme Court of the United States

October Term, 1996

AUDAY MAKI AND SALWA ATWAN,

Petitioners,

v.

WILLIAM LAAKKO AND BEVERLY LAAKKO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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43pp

QUESTION PRESENTED

Does the protection afforded to "familial status" under the Fair Housing Act, 42 U.S.C. § 3601 et seq., prevent landlords from charging additional rent for each additional child?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Sixth Circuit were:

AUDAY MAKI, appellant;
SALWA ATWAN, appellant;
AHMED MAKI, represented by Auday Maki and Salwa Atwan, appellant;
MOHAMMED MAKI, represented by Auday Maki and Salwa Atwan, appellant;
SARAH MAKI, represented by Auday Maki and Salwa Atwan, appellant;

WILLIAM LAAKKO, appellee;
BEVERLY LAAKKO, appellee;
LIISA LAAKKO, appellee.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

OPINIONS AND ORDERS BELOW 1

JURISDICTION OF THIS COURT 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Parties 3

B. The Decision 4

REASONS FOR GRANTING THE WRIT 4

I. THE CIRCUIT COURTS HAVE IGNORED THE DEFINITION OF "FAMILIAL STATUS" IN THE FAIR HOUSING ACT AND HAVE CREATED CLEAR SPLITS OF AUTHORITY REGARDING THE PROTECTION FOR "FAMILIAL STATUS" 6

CONCLUSION 10

APPENDIX 1a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

City of Edmonds v. Oxford House, Inc., ___ U.S. ___, 115 S.Ct. 1776 (1995) 4

Maki v. Laakko, 88 F.3d 361 (6th Cir. 1996) 4, 6, 8

Mountain Side Mobile Estates v. Secretary of HUD, 56 F.3d 1243 (10th Cir. 1995) 7

Pfaff v. U.S. Dept. of Housing, 88 F.3d 739 (9th Cir. 1996) 5, 7, 8

Soules v. Dept. of Housing & Urban Dev., 967 F.2d 817 (2nd Cir. 1992) 9

U.S. v. Badgett, 971 F.2d 1176 (8th Cir. 1992) 8

ADMINISTRATIVE DECISIONS

Beardshear v. Bitzanakis, 1994 WL 681040 (H.U.D.A.L.J.) 5

Garrett v. Bathalter, 1993 WL 668290 (H.U.D.A.L.J.) 5

Hauge v. Gil-Her, Ltd, 1992 WL 613678 (H.U.D.A.L.J.) 5

Metropolitan Milwaukee Fair Housing Council, Inc. v. Lake Country Publications, 1994 WL 271082 (H.U.D.A.L.J.) 5

Miller v. Beninato, 1994 WL 270071 (H.U.D.A.L.J.) 5

Wagner v. Orosz, 1995 WL 108210 (H.U.D.A.L.J) 5

STATUTORY PROVISIONS

28 U.S.C. § 1257(a) 1

42 U.S.C. § 3602(k) 2, 3

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 3604 2

42 U.S.C. § 3607(b)(1) 3

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Auday Maki and Salwa Atwan, respectfully petition for a writ of certiorari to review the decision and judgment entered by the United States Court of Appeals for the Sixth Circuit on July 2, 1996, and a petition for rehearing and rehearing en banc, denied on August 12, 1996. Pursuant to a motion filed before Justice Stevens, petitioners were granted until December 10, 1996 to file this petition. App. 27a.

OPINIONS AND ORDERS BELOW

The opinion of the Sixth Circuit is reported at 88 F.3d 361 (6th Cir. 1996). A copy of that opinion is reproduced in the Appendix at 1a. The decision of the district court is unreported and is reproduced in the Appendix at 17a.

JURISDICTION OF THIS COURT

The judgment of the Sixth Circuit was entered on July 2, 1996. App. at 1a. The petition for rehearing was denied on August 12, 1996. App. at 26a. This Court, per Justice Stevens, granted until December 10, 1996 to file this certiorari petition. That order is reproduced in the Appendix at 27a. This Court has jurisdiction to review the judgment of the Sixth Circuit pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 3604 states that:

> it shall be unlawful –
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make such a preference, limitation, or discrimination.

Unlike race, religion, sex, color, or national origin, "familial status" is defined in the same statute. Under 42 U.S.C. § 3602(k):

> 'Familial status' means one or more individuals (who have not attained the age of 18 years) being domiciled with –
>
> (a) a parent or another person having legal custody of such individual or individuals.

When Congress added the section prohibiting discrimination on the basis of "familial status" it simultaneously added a section excepting:

> any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. 42 U.S.C. § 3607(b)(1).

STATEMENT OF THE CASE

This case presents the question of the meaning of "familial status" as defined in the Fair Housing Act, 42 U.S.C. § 3602(k). Petitioners contend that the definition of "familial status" requires that the fact that a parent has the custody of children should make no more impact on rental rates or rental decisions than that parent's race, sex, religion or color. In short, that the parent's custody of the children be considered a non-factor in the terms and conditions of rental or sale of housing. The Fair Housing Act created such protection to help families with children find housing to the same degree as those without children. The exception under 42 U.S.C. § 3607(b)(1) was made to ensure that too many persons were not placed in housing incapable of safely housing them.

A. The Parties

Petitioners, Auday Maki and Salwa Atwan are the custodial parents of Ahmed, Muhammed, and Sarah, all three of whom are under 18 years of age. Respondents, Beverly and William Laakko were two of the appellees below.

B. The Decision

The underlying case before this Court involves a family of five persons. The family includes two parents and three children under the age of 18. The family immigrated to this country over 10 years ago. They first came to this country and lived in apartments in Lincoln, Nebraska, then moved to Seattle, Washington and came to the Detroit area in 1990.

The lease the Maki family signed, and under which they lived until vacating the apartment rented to them by respondents, allowed the landlord to charge more money for each additional child the Makis had living with them. *Maki v. Laakko*, 88 F.3d 361, 366 (6th Cir. 1996). The respondents admittedly used this provision to increase the rent of another tenant upon finding that a child was living there. That lease provision, as well as appellees' treatment of the Maki family – during and after the lease was terminated – serve as the basis for the petitioners' claims of discrimination due to "familial status." The case before the district court was dismissed on summary judgment. App. 17a. That decision was affirmed on appeal. App. 1a.

REASONS FOR GRANTING THE WRIT

Congress amended the Fair Housing Act in 1988. *See City of Edmonds v. Oxford House, Inc.*, ___ U.S. ___, 115 S.Ct. 1776, 1778 ft. 1 (1995). The amendment added several sections that provided protection to "familial status." Currently, many of the federal courts have ignored or failed to recognize the legislative definition of "familial

status" and have simply given their own gloss to that term. Even the Secretary of Housing and Urban Development has taken differing and confused approaches to "familial status."[1] These approaches largely ignore the definition of "familial status" in the Act and have resulted in a conflict among the circuits. As a result of these conflicts, families travelling or moving across the country may be subjected to a variety of discriminatory housing policies that the Fair Housing Act amendment that added "familial status" was meant to eliminate.

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[1] *See Wagner v. Orosz*, 1995 WL 108210 (H.U.D.A.L.J.) (Initial Decision and Consent Order) (a policy concerning the **number** of persons who could occupy rental apartments discriminated against families with children); *Hauge v. Gil-Her, Ltd*, 1992 WL 613678 (H.U.D.A.L.J.) (Initial Decision and Consent Order) (a policy limiting **number** of persons in a rental property constituted familial status discrimination); *Metropolitan Milwaukee Fair Housing Council, Inc. v. Lake Country Publications*, 1994 WL 271082, 6 (H.U.D.A.L.J.) (Initial Decision and Consent Order) (newspaper ad claiming "perfect for a single person" violates fair housing policy showing a preference on basis of familial status); *Miller v. Beninato*, 1994 WL 270071, 1 (H.U.D.A.L.J.) (Initial Decision and Consent Order) (a restriction on the number of children and/or persons who could occupy units that was more restrictive than required by local ordinance violated the Fair Housing Act); *Beardshear v. Bitzanakis*, 1994 WL 681040 (H.U.D.A.L.J.) (Initial Decision and Consent Order) (making a statement that indicated a preference or limitation as to the **number** of children who could reside in the apartment violates the Fair Housing Act); *Garrett v. Bathalter*, 1993 WL 668290 (H.U.D.A.L.J.) (Initial Decision and Consent Order) (refusing to rent to family because of the number of children violates the Fair Housing Act). These cases should be compared to the Secretary's position in *Pfaff, infra*.

Therefore, certiorari should be granted to restore the plain textual meaning of the statute; to ensure that families do not receive disparate treatment around the country when they attempt to rent or purchase housing; and to restore protection for family status.

I. THE CIRCUIT COURTS HAVE GENERALLY IGNORED THE DEFINITION OF "FAMILIAL STATUS" IN THE FAIR HOUSING ACT AND HAVE CREATED CLEAR SPLITS OF AUTHORITY REGARDING THE PROTECTION FOR "FAMILIAL STATUS"

The various circuits have taken a variety of approaches to the term "familial status." Those opinions range from the proper to the strained. In those cases where the decision is especially wrong, the courts have generally ignored, failed to cite, or rejected the straightforward definition provided by statute.

In *Maki v. Laakko*, the case upon which this petition is sought, the Sixth Circuit eliminated virtually all protection for "familial status" under the Fair Housing Act. The court ignored, without acknowledgement of its existence, the definition of "familial status" given by law.

The Sixth Circuit ignored the definitional section, ignored several other sections that clarify the definition and instead merely opined:

> The Act merely outlaws discrimination on the basis of familial status. Under a rental pricing system that charges additional rent for additional occupants, a mother, father, and one child would be charged the same amount of rent as

> three unrelated individuals. Therefore, such a policy is neutral with respect to family status.

App. at 13a. This redefinition of the term "familial status" certainly is neutral with respect to number of persons. However, it changes the term "familial status" into the term "age."[2] This view not only eviscerates the definition, it also creates several circuit conflicts.

In *Mountain Side Mobile Estates v. Secretary of HUD*, 56 F.3d 1243 (10th Cir. 1995), the court considered a mobile home park's policy of allowing no more than a three person per lot occupancy. *Id.* at 1246. The court there held that this policy had a discriminatory impact and could be upheld on a showing of genuine business need. *Id.* at 1254. Since the defendant showed that the limitation was necessary to deal with the plumbing of the mobile home park, its policy was legal. *Id.* at 1255. Direct discrimination due to "family status," the presence of a child, was shown. Nevertheless, the court thought that business necessity justified direct discrimination.

The *Mountain Side* standard was rejected by the court in *Pfaff v. U.S. Dept. of Housing*, 88 F.3d 739 (9th Cir. 1996). In that case, the court was faced with a numerical occupancy standard which had a disproportionate impact on children. *Id.* at 745. The court in *Pfaff* explicitly rejected the business necessity standard of *Mountain State*, and allowed an occupancy standard that was a reasonable

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[2] Congress could have done what the Sixth Circuit did by adding "age" instead of "familial status" to the Housing Discrimination Act and defining "age" as being a minor. Congress knows how to protect age categories. 29 U.S.C. § 621 et seq. (the ADEA).

attempt "to preserve the value of one's property." *Id.* at 749. In this decision the court went out of its way to attack H.U.D.'s actions as "outside the limits of good – or acceptable – government" and accused it of acting "arbitrarily and capriciously." *Id.* at 749-50.

However, the *Pfaff* decision, although it does not go as far as the decision in *Maki*, similarly ignores the fact that the Fair Housing Act protects "familial status" as defined by statute. Certainly, if landlords ignored "familial status" and based rent upon water usage, wear and tear, or other factors evidencing discriminatory impact, questions about standards to apply would arise. *Pfaff* at 746. However, in *Pfaff*, *Maki*, and *Mountain States*, the landlords were using as a factor in housing costs an impermissible factor, "familial status." They merely differed upon the justification needed for such treatment from none in *Maki* to preserving the value of property in *Pfaff*.

These standards were rejected in *U.S. v. Badgett*, 971 F.2d 1176 (8th Cir. 1992). In *Badgett* the court considered whether or not a policy of limiting one bedroom apartments to one person and two and three bedroom apartments to two persons violated the Fair Housing Act. *Id.* at 1177. That court noted that even though this policy was facially neutral, its disparate impact on a protected class could be a violation of the Act. *Id.* at 1179. Since, the complex had steered a mother and child to a two bedroom apartment it had violated the Act. *Id.* at 1180. The court noted that the apartment's limitation on the number of persons who could live in the apartment prevented the majority of families with children from living there. *Id.* at ft.3.

In *Soules v. Dept. of Housing & Urban Dev.*, 967 F.2d 817 (2nd Cir. 1992), the court considered whether or not questions about the noisiness of children constituted discrimination. *Id.* at 826. The court there found that noise was not a pretext for discrimination against children, but was used to ensure a quiet environment in the apartment. *Id.* Thus, children were not being discriminated against, but noise. This case is especially informative because the Second Circuit properly noted that the landlord's questions about the number and age of children was justified due to local health codes. *Id.* at 825.

Thus, the various circuits have taken a variety of approaches to the term "familial status." In many instances, the courts ignore the definition of "familial status" substituting various standards. This failure to consider the definition is understandable given the fact that terms like race, sex or religion are not defined by statute. However, "familial status" is defined. If that term were replaced by race or sex in the above cases, incredulity would result. Children, unable to work and unable to vote, were given protection by law. The courts have created conflicts regarding this term, and have made great strides in eliminating any protection for "familial status."

CONCLUSION

The Sixth Circuit eviscerated the protection available to "familial status" by allowing landlords to charge additional rent for each additional child a family has. This decision has created a conflict in the circuits, ignored the clear definition of "familial status"; and exacerbated a marked degree of confusion among the circuits in interpreting plain language. Because this confusion is even shared by the Secretary of Housing and Urban Development, the entity responsible for interpreting the Fair Housing Act, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN J. SAFRANEK
651 E. Jefferson
Detroit, MI 48226
Attorney for Petitioners

Auday MAKI and Salwa Atwan,
Plaintiffs-Appellants,

v.

William LAAKKO, Beverly Laakko and
Liisa Laakko, Defendants-Appellees.

No. 94-1994.

United States Court of Appeals, Sixth Circuit.

Argued Oct. 16, 1995.

Decided July 2, 1996.

Stephen J. Safranek (argued and briefed), University of Detroit School of Law, Detroit, MI, for Plaintiffs-Appellants.

Brian D. Figot (argued), Troy, MI, for William and Beverly Laakko.

William Laakko, Birmingham, MI, pro se.

Brian D. Figot (argued), Troy, MI, Thomas M. Fallucca (briefed), Robert P. Ufer & Assoc., Bloomfield Hills, MI, for Liisa Laakko.

Before: BROWN, BOGGS, and NORRIS, Circuit Judges.

BOGGS, Circuit Judge.

Former tenants appeal a grant of summary judgment in favor of their landlords in this housing discrimination suit. We agree with the district court that there is no evidence that the landlords discriminated against or otherwise harmed the tenants, and we affirm the district

court's decision to grant summary judgment on the federal claims in this suit.

I

The Maki family brought suit against their landlords, the Laakko family, because they believe their treatment by the Laakkos violated federal laws forbidding discrimination against tenants on the basis of family status and national origin. They also raised a number of pendant state claims concerning landlord-tenant law, security deposits, and state tort law.

The Maki family is of Iraqi origin and consists of two adults, Dr. Auday Maki and Salwa Atwan (husband and wife), and their three children. The Makis moved to Michigan in September 1990, because Dr. Maki had accepted a research position at Wayne State University. The Maki family, apparently impressed by the schools and overall quality of the neighborhood, rented the lower apartment in a two-unit apartment building at 1258 Maryland in the city of Grosse Pointe Park, a suburb of Detroit.

The Makis signed a one-year lease, beginning on September 1, 1990, that expressly provided for a monthly rent of $565, with a $40 discount if the rent was paid by the third of each month. The lease also stated that after the lease expired, holding-over would be permitted on a month-to-month basis. When their one-year lease expired at the end of August 1991, the Makis did in fact hold over as month-to-month tenants until they ultimately vacated the premises on July 18, 1993. The lease provided for termination by either party after the first year, upon 30

days notice without any obligation, and the Makis agreed at a deposition that they understood this provision.

The Makis were still living in the apartment as month-to-month tenants when William and Beverly Laakko purchased the building in June 1992. The Laakkos offered the Makis a one-year lease, with no increase in rent, for the period of June 1, 1992 through May 31, 1993. Because Dr. Maki's position at Wayne State was scheduled to end in August 1992, the Makis were unsure of their finances and need for the apartment beyond August. Accordingly, they declined the Laakkos' offer of a one-year lease, and sought to continue as tenants in the same apartment on a month-to-month basis at the original rental rate. This relationship appears to have gone on without incident until the spring of 1993. At no time did the Makis ever ask for a lease, on any terms.

Both the financial and personal aspects of this arrangement began to change in May 1993, when the Laakkos proposed a rent increase, and the relationship ended in July when the Makis moved out. Salwa Atwan says Mrs. Laakko abruptly demanded $100 more in rent in a phone conversation (initiated by Atwan) on May 31. Atwan asked for time to move, and Laakko said "We don't want you to move, just to pay more rent." On June 1, the Laakkos sent a letter raising the monthly rent, effective July 1, from $565(-40), to $625(-50). The effective increase was $50, if rent was always paid on time. The next communications between the sides involved their lawyers. Maki contacted a lawyer, Prof. Steven Safranek. The Laakkos say, and Safranek doesn't deny, that he called them around June 7. The Laakkos called Michael Drew, their lawyer. The Makis' response to this request

and the subsequent negotiations between the parties are the most serious area of contention between the parties and are the key to resolving this appeal.

The Laakkos' version of events is that the Makis refused the rent increase, negotiated over a precise time for their departure, and departed on July 18, after the Laakkos sent a letter on June 28 giving the Makis until August 1 to find another apartment and quit the premises. Whether this letter constituted an eviction notice or was simply confirmation of when the Makis must move, given their refusal to agree to the rental increase, is a critical facet of this dispute.

The Makis' interpretation of events is that the Laakkos evicted them by sending the letter of June 28. According to this version of events, the Makis were content to stay on at the apartment and pay the additional rent, on a month-to-month basis, but were forced out by the Laakkos by their letter to quit of June 28.

In conjunction with this argument, the Makis also contend that they were forced to look for another apartment because the Laakkos harassed them. The plaintiffs point to a handful of instances where the Laakkos warned the Makis about certain activities. The warnings appear to have begun on or around June 1, 1993. Since the Laakkos' daughter, defendant Liisa Laakko, moved into the upper apartment on this same day, the Makis claim that the alleged harassment was related to her presence, and that the Laakkos changed their approach to the Makis because they did not want them living in proximity to their daughter. As proof of this alleged harassment, the Makis refer to a letter from the Laakkos asking

that they remove some boards from a chestnut tree in the yard, calling their attention to marks in the hallway carpet, and asking the Makis to refrain from placing garbage and other items in the hallway. As additional proof, the Makis point to notes left by Liisa Laakko instructing the Makis to refrain from taking mail addressed to "resident and/or owner."

Against this backdrop, the Makis and Laakkos communicated back and forth through their respective attorneys regarding when or if the Makis would end their tenancy. Whether the June 28 letter was an eviction letter depends upon the nature of these conversations between counsel.

The Makis characterize these exchanges as establishing that the June 28 letter was a notice of eviction, rather than a confirmation that they would voluntarily move by August 1 because they did not want to pay more rent.

The Laakkos argue that these exchanges show that the Makis voluntarily decided to move because they did not want to pay the increased rent. According to the Laakkos, supported by the affidavit of their lawyer, Michael Drew, the sequence of events was as follows. The Laakkos indicated that the rent would increase by $50, prompting the Makis to contact attorney Stephen Safranek. Attorney Safranek called Drew. In this call, Safranek threatened a federal suit over the Laakkos' decision to increase the rent by $50. Drew and Safranek, however, then came to an agreement allowing the Makis to stay at the apartment until they found another one by July 1. After being told the Makis would not move until July 18, and concerned that the "grace period" already given

might extend indefinitely, Drew, with Safranek's knowledge and consent, sent the June 28 letter explaining that the Makis must leave by August 1.

Although it might appear that there is a factual dispute serious enough to preclude summary judgment, the record is actually clear that the Makis sought to terminate their tenancy and that the purported notice of eviction is no more than the product of a negotiated solution reflecting the fact that the Makis no longer wished to be tenants of the Laakkos, but wanted some time to move. The fact that the Makis wanted to end their tenancy is clear from several parts of the record, which are discussed in more detail below.

The district court granted summary judgment for defendant on this basis on all the federal claims. The state claims were dismissed without prejudice. The district court had temporarily blocked the depositions of two other tenants at the apartment building, pending a status conference held June 28, 1993. The Makis claim that these depositions were blocked permanently and that summary judgment was improperly granted on July 22, 1993, before the close of discovery scheduled for August 1.

II

We review *de novo* the decision of a district court to grant summary judgment. *Ashbrook v. Block*, 917 F.2d 918, 921 (6th Cir.1990). To preclude summary judgment, the nonmoving party must present evidence, beyond his pleadings and his own conclusory statements, to establish the existence of specific triable facts. *Ibid.*

We conclude that the Makis' claim that they were forced from the apartment by the Laakkos was properly dismissed on summary judgment because the facts only allow the conclusion that the Makis left voluntarily. To state a prima facie case of housing discrimination under either 42 U.S.C. Sec. 1981 or 42 U.S.C. Sec. 3601 *et seq.*, a plaintiff must show the following:

(1) that plaintiff is a member of a protected class;

(2) that plaintiff applied for and was qualified to rent or purchase certain property or housing;

(3) that plaintiff was rejected;

(4) that the housing or rental property remained available thereafter.

Selden Apartments v. Dep't of Housing and Urban Dev., 785 F.2d 152, 159 (6th Cir.1986). Summary judgment was appropriate because the record indicates that the Makis were never denied housing that they desired, and thus cannot meet the second element outlined in *Selden*.

Instead, the facts demonstrate that the Makis were unhappy with the rent increase, started looking for a new apartment, and reached an agreement with the Laakkos concerning when they would move. The uncontroverted testimony of the Laakkos establishes that they were willing to keep the Makis on as tenants, as long as they agreed to pay the rent increase. The Makis were given at least two chances to retain the apartment, yet refused the offer of a one-year lease, and balked at the rent increase to the extent that they refused to initial the letter notifying them of a rent increase, called a lawyer to complain about it, and only paid the increased rent for one month, in the context of an agreement to leave at the end of the

month. The only evidence that the Makis were willing to continue their tenancy after the rent increase is their current claim that they were willing to stay in the apartment and pay the increased rent indefinitely.

We are confident that the record as a whole provides enough evidence to contradict this claim and that the district court could grant summary judgment without having to make any credibility determinations or otherwise impermissibly weigh the evidence. The Makis' efforts to establish that they were uncomfortable in the apartment due to "harassment" serve to contradict any claims that they were happy to stay on in the apartment, yet were evicted. Counsel for the Makis summarizes their desires in his reply brief by arguing that "the only reason *they wanted to leave the apartment* was due to the treatment they started to receive at the hands of the Appellees around June 1, 1993." Appellants' Reply Brief at 12. The fact that the Makis wanted to leave and were looking for another apartment, coupled with the uncontested affidavit of Attorney Michael Drew that he drew up the notice to quit tenancy as a compromise to allow the Makis sufficient time to move and yet assure the Laakkos of a date when the apartment would be open for new tenants convinces us that the Makis' claim that they were evicted is unsupported.[1]

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[1] Plaintiffs' counsel repeatedly attempts to contradict this affidavit by unsworn assertion. *See* Plaintiffs' Brief in Opposition to Defendants' Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment, pp. 4-5 filed June 27, 1994 ("Safranek informed Mr. Drew that this was not his understanding"); Plaintiffs' Response to Defendants' Brief in Opposition to Plaintiffs' Cross-Motion for

The harassment claim, while serving as a convenient explanation for the evidence that the Makis moved voluntarily, does nothing to advance their discrimination claim. The incidents that the Makis claim constituted harassment amount to no more than minimal friction between a landlord and tenants. Counsel for the Makis should have informed them that activities such as admonishments about excessive wear, use or abuse of areas they were not explicitly given the right to use by their month-to-month lease, and taking mail addressed to the "owner/resident" do not amount to harassment. The fact that counsel for the Makis chose to rely on such weak facts to support a claim for housing discrimination when the Makis appear to have vacated voluntarily is a telling indictment of just how meritless the claim is. The Makis were in no way forced from their tenancy because of harassment.

III

Counsel for the Makis was not, however, content merely to argue that the Makis' voluntary departure from their leasehold constituted discrimination. Rather, he also made an unprecedented argument that the rent increase

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Partial Summary Judgment, p. 1, n. 1 filed July 15, 1994 ("Attorney is prepared to file an affidavit contradicting Michael Drew's affidavit"); Appellants' Brief at 10 ("Attorney was called about this letter and told that no such date was agreed upon," citing the June 27 Brief); Appellants' Reply Brief at 2 ("Appellees specifically denied this alleged fact," citing the July 15 Response). However, this is all wind-up and no pitch. In the absence of opposing affidavits, the Drew affidavit remains uncontroverted.

that precipitated the Makis' decision to seek less expensive quarters constituted impermissible discrimination on the basis of family status.

42 U.S.C. Sec. 3604(b) prohibits discrimination in the terms or conditions under which housing is sold or leased. The Makis have seized upon the fact that it is unlawful to discriminate on the basis of "familial status," and contend that the Laakkos decided to increase their rent because they had children, thereby discriminating against them on the basis of family status. The statute that serves as the basis for this claim makes it unlawful

> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. Sec. 3604(b). The Makis thus contend that the Laakkos decision to raise their rent was illegally motivated because of the Makis' "familial status."

This claim suffers from factual shortcomings similar to those afflicting the Makis' other claims, and would require this court to make an unprecedented and patently ludicrous extension of the law. In his brief and at oral argument, counsel for the Makis argued that the provision of the Fair Housing Act excerpted above makes it illegal for landlords to charge additional rent on the basis of the number of persons occupying dwellings if the "persons" are children.

Safranek argues explicitly that the familial status of children will be unprotected if a landlord can charge the same rent for two adults and one child as for three adults,

because then there will have been an increase "because of" the child, even though there would have been exactly the same increase "because of" a third adult. Safranek is right that this is a claim of first impression, perhaps because it is a claim of such breathtaking audacity that no one ever dared to raise it before. Certainly, no case, article, or treatise discussing "familial status" discrimination ever thought to contemplate the idea that treating a child the same as other persons could be discrimination. All of the cases and commentators discuss the opposite possibility: that a landlord would refuse to rent or charge *more* if there were two adults and a child than if there were three adults. *See Glover v. Crestwood Lake Section 1 Holding Corp.*, 746 F.Supp. 301, 303, 310 (S.D.N.Y.1990). Indeed, the essence of non-discrimination is to treat persons the same, despite the alleged discriminatory condition.

Though plaintiffs make much of the fact that the plaintiffs' lease (to which defendants were not a party) states that premises will not be occupied by more than "[stated number] of adults and [stated number] of children," the rent charged was not stated or computed in terms of the composition of the family in the apartment. There is also an "extra party" clause, never invoked in this case, that specifies additional rent of $1.50 per day if extra persons (above the number specified in the lease) stay in the apartment. Plaintiffs' statement in their brief that defendants were charging $45 for each child is wholly an invention of counsel.

While plaintiffs admit that there is no precedent to this effect in this circuit, counsel for the Makis suggests in his brief that a contrary reading would "eviscerate the

statute," and that case law from other circuits supports his position. Counsel calls our attention to *United States v. Badgett*, 976 F.2d 1176 (8th Cir.1992), and *Soules v. Dep't of Housing and Urban Dev.*, 967 F.2d 817 (2d Cir.1992). Neither case supports the proposition that charging additional rent for additional occupants violates Sec. 3604(b) when the additional occupants happen to be children. In *Badgett*, the Eighth Circuit held that a policy requiring only a single occupant in one-bedroom apartments, coupled with efforts to discourage a single mother from renting a two-bedroom apartment, violated the Fair Housing Act. *Badgett* thus deals exclusively with occupancy standards, and neither addresses variable rental-rates nor establishes a principle applicable to such matters. The Makis' brief cites *Soules* for the proposition that Congress intended the FHA to eliminate discrimination against families with children, and counsel for the Makis, at oral argument, suggested the case supported his strained reading of the statute. *Soules*, however, is properly cited only for the proposition that Congress meant the FHA to "eliminate direct discrimination against families with children." *Soules*, 967 F.2d at 821. Thus, despite his assertions at oral argument, there is no case law to support the position taken by counsel for the Makis.

Nor does his argument that the plain language of the FHA prevents landlords from applying additional per-person rental charges to children persuade us of the legitimacy of the Makis' claim. The Makis' brief argues that

> If this circuit were to adopt the position advocated by the appellees, and accepted by the district court, it would allow landlords to place a heavier burden on

> families than single persons and would especially hurt families with children. In fact, such a decision would effectively destroy the purpose of the addition of "familial status" to the Fair Housing Act.

Opening Brief of Plaintiff/Appellant at 20. We cannot agree with the Makis' reading of the FHA.

The text of the statute offers no support for the Makis' position that the FHA renders illegal efforts to charge tenants more for each occupant. The Act merely outlaws discrimination on the basis of familial status. Under a rental pricing system that charges additional rent for additional occupants, a mother, father, and one child would be charged the same amount of rent as three unrelated individuals. Therefore, such a rental policy is neutral with respect to family status.

IV

In addition to arguing their discrimination claims in a confusing thicket of title VII and Fair Housing Act provisions (unnecessary given that the standards are the same for both pursuant to the *Selden* holding) counsel for the Makis tried to append a claim pursuant to 42 U.S.C. Sec. 1985(3), alleging a conspiracy to deprive the Makis of their rights. Rather than develop a full argument for their Sec. 1985(3) claim, the Makis' brief does no more than assert that their arguments in support of their Sec. 1981 and Sec. 3604 claims show that they should prevail under this provision as well.

Under 42 U.S.C. Sec. 1985(3) the appellants must show the following: (1) a conspiracy between at least two persons; (2) that the object of the conspiracy is to deprive

the plaintiff of equal protection of the law or of privileges and immunities under the law; (3) an act by at least one conspirator in furtherance of the object; and (4) injury to the plaintiff as a result of the conspiracy. *Griffin v. Breckenridge*, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 1798-1799, 29 L.Ed.2d 338 (1971).

As the district court correctly pointed out (Judgment and Order at 7), to state a claim under this provision, the Makis must show there is some racial or otherwise class-based invidiously discriminatory animus behind the Laakkos' actions. *Griffin*, 403 U.S. at 102, 91 S.Ct. at 1798. The district court also correctly noted that the Makis presented no facts to support this element of *Griffin*, and that this case did not appear to involve any class-based animus on the part of the Laakkos.

V

Finally, the Makis argue that the district court incorrectly granted summary judgment before the close of discovery. Summary judgment is, of course, inappropriate before the passage of adequate time for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554-2555, 91 L.Ed.2d 265 (1986). Because further discovery would not have changed the legal and factual deficiencies we have already noted in the Makis' claims, however, affirmance of the district court is warranted.

This allegation of error might carry some force if the Makis could explain why the depositions of the current and former tenants, which were delayed pending a status conference on June 28, would furnish the missing facts to complete their prima facie case for discrimination.

Instead, counsel for the Makis explains that this further discovery might uncover proof of disparate impact. That is, the depositions might uncover that the Laakkos afforded even more favorable treatment to renters with different ethnic backgrounds or family statuses. Since this would still not establish how the Makis were adversely affected by the Laakkos, given the foregoing analysis of the parties' intentions with regard to ending their relationship, any further discovery would not have affected the summary judgment decision. In any event, the court explicitly ruled, in an order of July 8, 1994, that it had not issued any protective order, and that plaintiffs' unsupported claim to the contrary could be sanctionable. The discovery dispute will therefore not stand as grounds to disturb the summary judgment decision on appeal.

VI

We note that the resolution of this dispute has been far from costless. The Laakkos attempted to raise the rent on an apartment by $50 per month, which was wholly within their rights. They also withheld a $787.50 security deposit, an action that, while eminently disputable in state court, they had a strong colorable basis for doing (see the Laakkos' letter of July 22, 1993 concerning damage to the apartment. Plaintiff's Cross-Motion for Partial Summary Judgment, Exh. 8.) As a result of the current creative and artful (though meritless) lawsuit instituted by a law professor, the Laakkos have been forced to incur at least $36,000 in legal fees (see original counsel's motion to withdraw), even before oral argument in this case. Events such as this tend to bring into disrepute both the

legal profession and laws originally passed to address serious social ills.

VII

For the foregoing reasons, the decisions of the district court are all AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUDAY MAKI, SALWA ATWAN, for themselves and on behalf of AHMED MAKI, MOHAMMED MAKI and SARAH MAKI,

Plaintiffs,

Case No. 93-CV-74907-DT

vs.

HON. BARBARA K. HACKETT

WILLIAM LAAKKO BEVERLY LAAKKO, and LIISA LAAKKO,

Defendants.

_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed Jul 22, 1994)

Plaintiffs and defendants have filed cross-motions for summary judgment. For the reasons stated below, defendants' motion shall be granted and plaintiffs' motion shall be denied.

BACKGROUND

Plaintiffs filed a nine-count complaint arising out of landlord-tenant disputes which plaintiffs claim constitute housing discrimination on the basis of their alienage and familial status. Count I, II, III, VIII, and IX allege state law claims of partial eviction, retaliatory eviction, housing discrimination under Michigan's Elliot-Larsen statute,

MCL 37.2502, intentional infliction of emotional distress, and breach of contract. Counts IV, V, VI, and VII allege housing discrimination under federal civil rights statutes 42 U.S.C. §§ 1981, 1983, and 1985(3) and the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*

Plaintiffs are Auday and Salwa Maki and their three children, Ahmed Maki, Mohammed Maki, and Sarah Maki. Defendants are plaintiffs' former landlords, William and Beverly Laakko, and their daughter Liisa Laakko. Plaintiffs rented a home in Grosse Pointe Park from September 1, 1990, until July 18, 1993. Plaintiffs entered into a one-year lease for the rental of the home from September 1, 1990, until September 1, 1991. After the termination of their lease agreement, defendants continued as hold-over tenants renting on a month-to-month basis.

Defendants purchased the home in June, 1992. Defendants did not increase plaintiffs' rent and offered to enter into a one-year written lease with plaintiffs from June 1, 1992, to May 31, 1993, with no rent increase. Plaintiffs rejected the offer to enter into a one-year lease because Auday Maki was finishing a fellowship grant in August, 1992, and did not know if it would be renewed. After defendants had acted as plaintiffs' landlords for about one year without increasing their rent, defendants informed plaintiffs in May, 1993, that their rent would increase from $565 per month to $625 per month due to increases in property taxes and repairs. With a deduction for paying rent by the third of the month, the rent increase totaled only $50.

Shortly after defendants notified plaintiffs of the rent increase, plaintiffs' attorney contacted defendants and told them that the rent increase constituted discrimination and would be grounds for a lawsuit. After plaintiffs rejected the offer to rent at the increased rental rate, on June 28, 1993, defendants' counsel sent plaintiffs a notice to quit the premises on August 1, 1993, because their tenancy had ended. Plaintiffs moved out of their rented home on July 18, 1993.

In addition to the rent increase dispute, plaintiffs allege that the following acts constitute housing discrimination against them on the basis of their alienage and familial status: (1) that plaintiffs did not receive a garage space; (2) that plaintiffs were asked not to use part of the basement; (3) that defendants discussed a burn mark in the carpeting with plaintiff-tenants; (4) that defendant-landlords asked plaintiff-tenants to leave mail addressed to "resident" or "owner" to defendant Liisa Laako who lived in the upstairs flat.

Defendants seek summary judgment on the grounds that plaintiffs have presented no evidence suggesting they were discriminated against in the rental of housing based on their alienage or familial status. Plaintiffs have also filed a motion for partial summary judgment.

STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to judgment as a matter of law." The United States Supreme Court has affirmed the court's use of summary judgment as an integral part of the fair and efficient administration of justice. The procedure is not a disfavored procedural shortcut. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555 (1986).

"[T]he standard for determining whether summary judgment is appropriate is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Booker v. Brown & Williamson Tobacco Co. Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512 (1986)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat the otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48, 106 S.Ct. at 2510 (emphasis in original).

The United States Court of Appeals for the Sixth Circuit has held that trial courts considering a motion for summary judgment may not make findings of fact. The movant must conclusively show "that there exists no genuine issues as to a material fact and that the evidence together with all inferences to be drawn therefrom must be considered in the light most favorable to the party opposing the motion." *Watkins v. Northwestern Ohio Tractor Pullers Ass'n.*, 630 F.2d 1155, 1158 (6th Cir. 1980) (citations omitted).

The substantive law governs the determination of which facts are material. "Only disputes over facts which might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 270, 88 S.Ct. 1575, 1583 (1968). Mere allegations or denials in the non-movant's pleadings will not meet this burden. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

ANALYSIS

Defendants seek summary judgment on plaintiffs' claims of housing discrimination brought under federal civil rights statutes 42 U.S.C. §§ 1983, 1981, and 1985(3), and the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* Plaintiffs admit that they have not pled a violation of constitutional rights occurring under color of state law which is necessary to sustain a § 1983 claim and thus, have agreed to dismiss their § 1983 claim. Thus, the court shall only address plaintiffs' federal claims for housing discrimination under 42 U.S.C. §§ 1981, 1985(3), and the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*

In order to make a *prima facie* case of housing discrimination under § 1981 and under the Fair Housing Act, § 3604, a plaintiff must show:

(1) that he or she is a member of a protected class;

(2) that he or she applied for and was qualified to rent or purchase certain property or housing;

(3) that he or she was rejected; and,

(4) that housing or rental property remained available thereafter.

Selden Apartments v. United States Dep't of HUD, 785 F.2d 152, 159 (6th Cir. 1986). In this case, plaintiffs have failed to make a *prima facie* showing of housing discrimination because they cannot show that defendants refused to rent them an apartment or otherwise made the apartment unavailable to them or discriminated against them in the terms, conditions, or privileges of the rental of a dwelling. Plaintiffs actually rented the apartment for three years. The evidence shows that defendants encouraged plaintiffs to continue renting and offered to enter into a written one-year lease with them. Plaintiffs elected to stop renting as month-to-month hold-over tenants when defendants increased the rent, the first such increase in three years. At the time defendants told plaintiffs of the rent increase, defendants told plaintiffs that they did not want them to move.

The facts presented to this court show that this case involves a landlord-tenant dispute only. No evidence has been presented to this court to suggest that the landlord-tenant dispute was racially motivated or that defendants

discriminated against plaintiffs on the basis of their alienage or familial status. Because plaintiffs cannot even make a *prima facie* case of housing discrimination, summary judgment just be granted in favor of defendants on plaintiffs' claims under § 1981 and the Fair Housing Act.

Similarly, summary judgment must be entered in favor of defendants on plaintiffs' § 1985(3) claim. To establish a claim under § 1985(3), plaintiffs must show the following elements:

(1) two or more persons conspired;

(2) the purpose of the conspiracy must be to deprive plaintiffs of the equal protection of the laws or of equal privileges and immunities under the laws;

(3) one or more of the conspirators did or caused an act to be done in furtherance of the object of the conspiracy; and,

(4) plaintiffs must show that they suffered injury as a result of the conspiracy.

Griffin v. Breckenridge, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 1798 (1971). To state a claim under § 1985(3), plaintiffs must show there is some racial or otherwise class-based invidiously discriminatory animus behind defendants' actions. *Id.* at 102, 91 S.Ct. at 1798. Plaintiffs have failed to present any facts in support of their § 1985(3) claim. In fact, there is a real question as to whether plaintiffs' § 1985(3) claim could even survive a motion to dismiss under Fed.R.Civ.P. 12(b)(6). Because plaintiffs have failed to present any facts in support of their § 1985(3) claim, summary judgment must also be granted in favor of defendants.

District courts have discretion to dismiss supplemental state law claims if the federal claims are dismissed before trial. 28 U.S.C § 1367(c)(3); *see United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 1138 (1966). Because this order shall grant summary judgment in favor of defendants on all plaintiffs' federal claims, the court shall dismiss plaintiffs' supplemental state law claims alleged in counts I, II, III, VIII, and IX without prejudice.

Because the court shall grant defendants' motion for summary judgment, the court does not reach the issues addressed in plaintiffs' motion for partial summary judgment. The court notes that plaintiffs' motion does not identify which counts of the complaint as to which they are seeking summary judgment and appears to seek summary judgment on counts never actually pled in the complaint. Plaintiffs argue that they are entitled to the return of their security deposit under Michigan law, MCL § 554.601 *et seq.*, and that the court should find that defendants have violated the Michigan Consumer Protection Act MCL § 445.901 *et seq.* and the Truth in Renting Act (MCL 554.632 *et seq.*). Plaintiffs' arguments do not relate to the claims actually pled in their second amended complaint. Plaintiffs have not pled violations of Michigan's Landlord Tenant Relationship Act, the Michigan Consumer Protection Act, or the Truth in Renting Act. Under Fed.R.Civ.P. 56, motions for summary judgment are permissible when a party is seeking to recover upon "a claim, counter-claim, or cross-claim." A summary judgment motion is not the proper vehicle for raising claims for the first time which have not been properly pled in a complaint. Once again, the court must remind

plaintiffs' counsel that frivolous pleadings are grounds for sanctions under Fed.R.Civ.P. 11.

CONCLUSION

For the reasons stated above,

IT IS ORDERED that defendants' motion for summary judgment as to counts IV, V, VI, VII hereby is GRANTED.

IT IS FURTHER ORDERED that plaintiffs' supplemental state law claims alleged in counts, I, II, III, VIII, IX hereby are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment hereby is DENIED.

/s/ Barbara K. Hackett
BARBARA K. HACKETT
United States District Judge

Dated: July 22, 1994

No. 94-1994

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUDAY MAKI AND SALWA ATWAN, Plaintiffs-Appellants, v. WILLIAM LAAKKO, BEVERLY LAAKKO and LIISA LAAKKO, Defendants-Appellees.	)	ORDER (Filed Aug. 12, 1996)

BEFORE: BROWN, BOGGS, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

November 13, 1996

Mr. Stephen J. Safranek
651 E. Jefferson
Detroit, MI 48226

Re: Auday Maki, et ux., et al.
v. William Laakko, et ux., et al.
Application No. A-344

Dear Mr. Safranek:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on November 13, 1996, extended the time to and including December 10, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Loretta S. Ruffin
Loretta S. Ruffin
Assistant Clerk